STATE OF MICHIGAN

COURT OF APPEALS

HELEN EDWARDS,

Plaintiff-Appellant,

v

ANNE HEPNER, M.D.,

Defendant-Appellee.

UNPUBLISHED
September 11, 2014

No. 316285
Grand Traverse Circuit Court
LC No. 12-029148-NH

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

In this medical malpractice case, the trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact). Plaintiff appeals as of right, and we affirm.

This case emanates from a failed transesophageal echocardiogram (TEE), which perforated plaintiff's esophagus. Plaintiff alleges that defendant committed malpractice by ordering the TEE. Along with her complaint, plaintiff filed an affidavit of merit by Richard Friedlander, M.D., who averred that he is "board certified in the medical specialties of Cardiovascular Disease and Internal Medicine, and . . . was so certified at all times relevant to this litigation." Defendant subsequently filed an affidavit of meritorious defense, averring that she is "a licensed physician who is board certified in cardiology with a certification in echocardiography." She also averred, "The applicable standard of care for me is that of a board certified cardiologist with certification in echocardiology of ordinary learning, judgment or skill when presented with the same or similar circumstances."

Defendant thereafter moved for summary disposition. She argued that Friedlander, who was plaintiff's only listed expert witness on the standard of care, was not qualified to so testify because he was not certified in echocardiography. Therefore, defendant argued, since plaintiff could not establish the standard of care, she could not sustain her claim, and summary disposition was required. The trial court agreed, dismissed the case with prejudice, and stated that defendant "[made] the decision to order a specialized test, which is in the very nature of her specialized certification."

Plaintiff argues that the trial court court's conclusion was erroneous because defendant was engaged in the specialty of cardiology at the time of the alleged malpractice and not the subspecialty of echocardiography.

We review a trial court's determination of the "one most relevant specialty" in a medical malpractice case and its "rulings concerning the qualifications of proposed expert witnesses to testify" for an abuse of discretion. *Woodard v Custer*, 476 Mich 545, 557, 576; 719 NW2d 842 (2006). A trial court abuses its discretion when its "decision results in an outcome falling outside the principled range of outcomes." *Id.*

"In a medical malpractice case, the plaintiff bears the burden of proving: (1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury." *Decker v Rochowiak*, 287 Mich App 666, 685; 791 NW2d 507 (2010) (quotation marks omitted). The plaintiff must present expert testimony to establish the applicable standard of care. *Id.* MCL 600.2169 governs who can provide such expert testimony, *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 217; 642 NW2d 346 (2002), and provides, in pertinent, part as follows:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
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> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.

Thus, in order to determine whether a proffered expert witness fulfills the requirements of MCL 600.2169, a trial court must identify "the specialty engaged in by the defendant physician during the course of the alleged malpractice," referred to as "the one most relevant specialty." *Woodard*, 476 Mich at 560. The plaintiff's expert witness must practice the same specialty. *Id.* at 560-561. Furthermore, our Supreme Court has held that "if a defendant physician specializes in a subspecialty, the plaintiff's expert witness must have specialized in the same subspecialty as the defendant physician at the time of the occurrence that is the basis for the action." *Id.* at 562.

In the present case, defendant was board certified in cardiology with a subspecialty certification in echocardiography at the time she ordered the TEE. Thus, *Woodard* and the plain language of MCL 600.2169 require plaintiff to establish the standard of care with an expert who also is board certified in cardiology with a subspecialty certification in echocardiography. There is no dispute that plaintiff's witness, Friedlander, was not certified in echocardiography. Therefore, we conclude that the trial court did not abuse its discretion when it determined that Friedlander did not meet the requirements of MCL 600.2169.

Plaintiff's argument that defendant was not utilizing her subspecialty when she ordered the TEE is unavailing. The TEE is a type of echocardiogram. It is clear that one who has a subspecialty in echocardiography would be using that specialized knowledge, which was gained from performing such procedures, when ordering an echocardiogram. To rule otherwise would mean that defendant conclusively did not use her specialized knowledge of echocardiography

when she ordered the echocardiogram, and that result is spurious on its face. This scenario is distinguishable from the example our Supreme Court provided in *Woodard*, where the hypothetical defendant doctor had specialties in cardiology and podiatry. The Court reasoned that if the alleged malpractice arose during heart surgery, it would be clear that the plaintiff would not need to produce an expert in podiatry to establish the applicable standard of care. *Woodard*, 476 Mich at 569 n 15; see also *Tate*, 249 Mich App at 219 n 1 (stating that a claim of malpractice related to an incorrectly set broken leg in the emergency room would implicate the doctor's specialty in emergency medicine but not her specialty in gynecology). While the Court acknowledged that expert testimony may be required in some instances to determine what specialties are relevant, *Woodard*, 476 Mich at 569 n 15, we do not believe that this is one of them. Plaintiff's reliance on the fact that before this incident other doctors who did not possess the subspecialty of echocardiography also ordered TEEs for plaintiff is not relevant. While plaintiff is correct that a doctor does not "need" to have a subspecialty in echocardiography in order to order a TEE, this does not mean that a doctor with such a subspecialty would not be using that subspecialty knowledge and experience in making her decision to order a TEE. What the previous doctors in this case did or what knowledge they drew upon when they ordered those earlier tests are irrelevant in deciding whether defendant, as a certified specialist in echocardiography, breached *the applicable standard of care for her* when she ordered the TEE. As defendant testified, "any procedure can be ordered." But "[c]arrying out the procedure is a different question." Here, as a cardiologist with a specialty in echocardiography, defendant balanced the risks and benefits of proceeding with the TEE and ultimately approved the procedure with the assistance of a gastroenterologist. Given that a TEE is at the center of this case and that defendant's subspecialty is echocardiography, the trial court's decision that the subspecialty was relevant clearly falls within the range of reasonable and principled outcomes.

Plaintiff also argues that defendant should have challenged Friedlander as an expert witness when his affidavit of merit was filed, or more specifically, that defendant's motion for summary disposition should have been treated as a motion to strike plaintiff's affidavit of merit. Plaintiff claims that if defendant's motion was viewed as such, dismissal should have been without prejudice, instead of with prejudice, which would have allowed her to refile.

MCL 600.2912d provides in pertinent part as follows:

> (1) Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169. The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:
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> (a) The applicable standard of practice or care.
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> (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.

> (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
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> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.

MCR 2.112(L)(2)(b) provides in turn that any challenges to the affidavit of merit "must be made by motion . . . within 63 days of service of the affidavit of the opposing party." Additionally, when a challenge is successful under MCR 2.112(L)(2), the appropriate remedy is to dismiss without prejudice. *Kirkalady v Rim*, 478 Mich 581, 586; 734 NW2d 201 (2007). This is different, however, than summary disposition under MCR 2.116(C)(10) because a grant of summary disposition is an adjudication on the merits of the case. See *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 510; 686 NW2d 770 (2004) (stating that "a summary disposition ruling is the procedural equivalent of a trial on the merits that bars relitigation on principles of res judicata"), overruled on other grounds *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012).

Plaintiff's argument is based on the view that defendant's motion for summary disposition should be treated the same as a motion to strike an affidavit of merit, which means that dismissal should have been without prejudice. However, "[u]nder Michigan's statutory medical malpractice procedure, plaintiff must obtain a medical expert at two different stages of the litigation—at the time the complaint is filed and at the time of trial." *Grossman v Brown*, 470 Mich 593, 598; 685 NW2d 198 (2004). At the initial stage when filing a complaint, under MCL 600.2912d(1), "a plaintiff is required to file . . . an affidavit of merit signed by an expert who the plaintiff's attorney *reasonably believes* meets the requirements of MCL 600.2169." *Id.* But with regard to the second stage at trial, a plaintiff's expert *must* meet the requirements under MCL 600.2169. *Id.* at 599. Thus, as defendant argues, a challenge to Friedlander's affidavit likely would have been unfruitful earlier, as plaintiff would have only been required to show that her attorney "reasonably believe[d]" that Friedlander "meets the requirements for an expert witness under section 2169." MCL 600.2912d(1). Therefore, plaintiff's argument that defendant's motion for summary disposition should be viewed as an attack on the affidavit of merit under MCR 2.112(L)(2) is not supported. Furthermore, as plaintiff recognizes, there is no statute or caselaw restricting when a defendant can challenge a medical malpractice expert witness. *Greathouse v Rhodes*, 465 Mich 885; 636 NW2d 138 (2001). Accordingly, the trial court did not err in dismissing plaintiff's case with prejudice.

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello